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No. 00-1604

IN THE
Supreme Court of the United States

BROWN & WILLIAMSON TOBACCO CORPORATION,
AS SUCCESSOR BY MERGER TO THE
AMERICAN TOBACCO COMPANY,
Petitioner,

v.

GRADY CARTER AND MILDRED CARTER,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In an individual lawsuit in which evidence was presented that a defendant tobacco company failed to warn the plaintiff of the adverse health effects of its cigarettes beginning in the late 1940's, should this Court review a decision of the Florida Supreme Court holding that an expert's testimony concerning the efficacy of a hypothetical cigarette package insert is not preempted by the Federal Cigarette Labeling and Advertising Act, where

(1) the defendant concedes that the ruling below accurately states applicable preemption principles under the Act as set forth by the Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992);

(2) the Act preempts only state-law failure-to-warn claims concerning a defendant's *post-1969 conduct*;

(3) the trial court instructed the jury that failure-to-warn liability could not be based on post-1969 evidence;

(4) the expert did not at any time testify that the hypothetical package insert should have been used post-1969; and

(5) no other federal or state court has ever considered whether the Act preempts testimony regarding package inserts or other cigarette labeling.

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STATEMENT OF THE CASE

Respondent Grady Carter began smoking unfiltered Lucky Strike cigarettes in 1947, when he was 16 years old. He continued to smoke Lucky Strikes until 1972, when he switched to a different brand of cigarettes, which was not the subject of the litigation below. Rec. 53: 2144-45, 2148. Mr. Carter contracted lung cancer in 1991, and, in early 1995, he and his wife, Mildred, filed a complaint for damages against petitioner alleging various negligence and strict liability theories, such as breach of warranty and product defect. The theory urged by the Carters that is the subject of the petition is that, prior to July 1, 1969, petitioner failed to warn Mr. Carter of the dangers of its product.

Petitioner's principal defenses at trial were (1) no negligence in failing to warn pre-1969; (2) lack of causation; (3) no defect; (4) no addiction; and (5) statute of limitations. Rec. 38: 417-65. In addition to those defenses, prior to trial, petitioner moved for partial summary judgment, seeking a ruling that all communications by petitioner post-July 1, 1969 were inadmissible as support for the Carters' failure-to-warn claim. It claimed that the admission of such evidence was preempted by 15 U.S.C. 1334(b), the preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), which became effective on July 1, 1969. The trial court, relying on this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), held that

> to the extent the plaintiffs' failure to warn claims rely upon the adequacy or inadequacy of post-1969 advertising or promotions regarding cigarettes they are preempted by 15 U.S.C.A. § 1334. To the extent such claims rely upon the adequacy or inadequacy of communications unrelated to advertising or promotion, they remain viable.

Cert. App. 45a.

At trial, petitioner raised the preemption issue again, this time in an effort to bar all testimony from Dr. Allan Feingold, the Carters' expert who testified about a hypothetical cigarette package insert that he claimed demonstrated the efficacy of warning smokers of tobacco's ill effects. The trial court ruled that Dr. Feingold's testimony was admissible as evidence of a potential pre-July 1, 1969 warning, but not with regard to the time period thereafter (Rec. 45: 1160), and instructed the jury accordingly based on an instruction requested by petitioner. Rec. 66: 4143-44; *see* Defendant's Requested Jury Instruction No. 13, Rec. 15: 2459.

The jury returned a verdict in favor of the Carters and awarded damages. On appeal, the Florida First District Court of Appeal reversed, primarily holding that the Carters' claims were barred by the statute of limitations and, alternatively, that the trial court erred in admitting evidence that was preempted by the FCLAA.

The Carters then sought and obtained discretionary review by the Florida Supreme Court, which, on November 22, 2000, reinstated the jury's verdict. After a careful review of the factual record, the Florida Supreme Court disagreed with the district court's conclusions that the trial court erred, both on the principal issue on appeal concerning the statute of limitations and on the preemption question, which was the only federal issue in the case. Regarding preemption, the court made a factual determination from its review of the record that the Carters' claims were clearly limited to injuries that resulted from petitioner's failure to provide adequate warnings *prior* to July 1, 1969. Thus, the court held that error, if any, concerning what constitutes "advertising or promotion" in the trial court's

ruling on the motion for partial summary judgment was harmless. Cert. App. 18a. Similarly, the Florida Supreme Court made the additional factual determination that the hypothetical package insert testified to by Dr. Feingold was offered only to support the Carters' pre-1969 failure-to-warn claim. Cert. App. 20a. Finally, the court held, alternatively, that the jury was presumed to have followed the instructions given them, which, as noted above, included an instruction limiting the Carters' failure-to-warn claim to the pre-July 1, 1969 period. Cert. App. 20a-21a.

REASONS FOR DENYING THE WRIT

The petition should be denied for two independent reasons. **First**, the petition relies on false factual premises that are fundamental to the claim for review. The petition asserts that (1) plaintiffs' expert testified that his hypothetical package insert should have been used to warn consumers after 1969, and that (2) the Florida Supreme Court affirmed a trial court ruling that had allowed the jury to decide the meaning of the term "advertising or promotion" as used in the FCLAA's preemption provision. As explained below, neither of these assertions is true.

Second, even assuming the truth of the facts upon which the petition is based, review should be denied. The no-preemption ruling below involves a mundane application of the facts to settled preemption law properly stated by the Florida Supreme Court. As a result, the petition does not point to a split in lower court decisions requiring this Court's resolution and none exists.

A. The Key Factual Premises Upon Which The Petition Are Based Are False.

To understand the factual distortions underlying the petition it is necessary first to review several undisputed propositions:

(i) One of several claims alleged by the Carters is that petitioner failed to warn Mr. Carter of the dangerous propensities of its cigarettes.

(ii) In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that, with regard to conduct that occurred prior to July 1, 1969, the FCLAA does not preempt any state-law damages claims, including a failure-to-warn claim; however, for conduct occurring after July 1, 1969, state-law failure-to-warn claims "based on smoking and health" "with respect to the advertising or promotion of any cigarettes" are preempted.

(iii) The trial court in this case gave the following jury instruction tracking the Court's ruling in *Cipollone*:

> Since January 1, 1966, federal law has required specific warnings to appear on packages of cigarettes sold in the United States. There is no claim in this case that The American Tobacco Company's cigarettes were not labeled in accordance with this statute.
>
> The federal law does not limit the liability of defendant against the claim of a failure to warn before July 1, 1969. However, you may not base any finding of liability on a determination that after July 1, 1969, the defendant should have included additional or more clearly stated warnings in the advertising or promotion

> of its cigarettes or that the defendant, through its advertising or promotional activities, neutralized, minimized, or undermined the effect of the federally mandated warnings during that time.

Rec. 66: 4143-44. This instruction is almost verbatim the preemption instruction requested by *petitioner*. *See* Rec. 15: 2459 (Defendant's Requested Jury Instruction No. 13, *citing Cipollone*). Petitioner requested no other instruction regarding preemption.

With the foregoing undisputed propositions in mind, we now turn to the particular points raised in the petition. Petitioner asserts that the admission of Dr. Feingold's testimony violated *Cipollone* in two respects. The factual premise for each assertion is false.

1. Petitioner first claims that the Carters' counsel "elicited expert testimony from Feingold that th[e] package insert should have been used to warn consumers of the risks of smoking, including during the time period after 1969." Pet. 5; *see also id.* at 17 (castigating the Florida Supreme Court for its purported "decision to permit the imposition of tort liability upon petitioner for failure to warn, after 1969"). To support this assertion, petitioner cites three pages from the massive trial transcript in this case. *See id.* at 6 (citing Rec. 45: 1153; Rec. 48: 1509; Rec. 49: 1536). A review of those three pages shows that petitioner's assertion is a complete invention. Dr. Feingold never stated that the hypothetical package insert should have been used post-1969, and neither Dr. Feingold nor any other witness ever suggested that the insert could be used to impose liability on petitioner for its post-1969 conduct. In fact, Dr. Feingold's testimony regarding the insert was focused on the time period prior to July 1, 1969. *See, e.g.*, Rec. 45: 1162-63 (package insert should have been used no later than 1953); Rec.

46: 1349-50; Rec. 48: 1494-95, 1501-03 (criticism of adequacy of 1966 warning label); Rec. 47: 1468-69 (package insert should have been used in 1965 when cigarette manufacturers confirmed that cigarette smoke condensate causes cancer in animals). That his testimony concerned the period pre-July 1, 1969 is underscored by the side-bar conference immediately prior to Dr. Feingold's testimony concerning the package insert at which (i) petitioner's counsel objected to the anticipated testimony in its entirety on preemption grounds (Rec. 45: 1158), (ii) the Carters' counsel assured the court that the testimony was offered only with regard to the efficacy of a pre-1969 warning and that his clients stipulated that the failure-to-warn claim was so limited (Rec. 45: 1159), and (iii) the trial judge overruled the objection, noting that he would instruct the jury as to what evidence should and should not be considered (Rec. 45: 1160). As the Florida Supreme Court explained:

> The defense objected, arguing that the package insert was preempted by the 1969 Act. The Carters' counsel argued at sidebar that the insert was only being offered to support the Carters' pre-1969 claims. The trial court overruled the defense's objection and permitted the introduction of the insert, but assured the defense that the jury would be specifically instructed regarding which dates to be considered by them with respect to warnings. Subsequently, at the end of the trial, the trial court gave the jury the [instruction set out above].

Cert. App. 20a.

Even prior to being given this instruction, the jury could not possibly have been confused on the temporal limit of the Carters' failure-to-warn claim. In addition to Dr. Feingold's testimony discussed above and the jury instruction, the parties' opening and closing statements made clear that the claim was

limited to pre-1969 conduct. *See, e.g.*, Rec. 38: 351-52, 398-99 (plaintiffs' opening: "damage was done to Mr. Carter's lungs from '47-'66"); Rec. 38: 421 (defendant's opening: "There's no claim in this case that after 1969 the warnings on the package were anything but adequate. So what we're focusing on is a period before 1969"); Rec. 65: 4003 (defendant's closing, characterizing Mr. Carter's claim: "He says if a warning had been given by the [defendant] before 1969 he would have avoided his cancer"); Rec. 65: 4009 (defendant's closing: "In evaluating whether a manufacturer has a duty to warn at any relevant time — the relevant time here is before 1969 obviously"). These statements are consistent with the fact that, as the jury was instructed (Rec. 66: 4127-28), Mr. Carter smoked petitioner's cigarettes from 1947 to 1972. Therefore, Mr. Carter had little reason to rely on post-1969 conduct, even on his design-defect and other claims that escape preemption under *Cipollone* regardless of the time period involved.

Nevertheless, petitioner complains that "[t]here was never a limitation either in respondents' questions or in their expert's testimony, which suggested that the insert was required only in the pre-1969 period" (Pet. 6), but does not maintain that federal law required the Carters' lawyers and witnesses to preface each of their utterances with an admonition concerning *Cipollone*'s pre-1969/post-1969 dichotomy. Any such assertion would be frivolous. As noted above, the preemption instruction given by the trial court was proposed by *petitioner*, and petitioner never asked for additional preemption instructions or for a question-by-question temporal limitation. The frequency and placement of limiting instructions are matters of state, not federal, law and therefore are not properly before this Court. In any event, on that state-law question, the Florida Supreme Court properly held that the limiting instruction was sufficient, noting that "juries are presumed to follow the instructions given them." Cert. App. 21a (citing Florida case law).

2. Petitioner next claims that review should be granted because the Florida Supreme Court improperly affirmed a trial court ruling that allowed the jury to decide the meaning of the term "advertising or promotion" as used in the FCLAA's preemption provision, 15 U.S.C. 1334(b). To be blunt, this argument is pure fantasy: Petitioner does not, because it cannot, cite any place in the record where the Carters ever suggested that a package insert, such as the hypothetical drawn up by Dr. Feingold, would escape preemption because it was not "advertising or promotion" under section 1334(b). To the contrary, the parties understood that post-1969 failure-to-warn liability based on health information on or accompanying the cigarette package is preempted; the only question raised about preemption during the trial was the pre-1969/post-1969 dichotomy, which was dealt with correctly by the trial court when it gave the *Cipollone* jury instruction. Thus, contrary to petitioner's assertion, the jury was never asked to decide whether the hypothetical package insert, or any other evidence, was "advertising or promotion" under section 1334(b). That fact is clear from the side-bar colloquy discussed above, in which the parties agreed that Dr. Feingold's testimony concerning the package insert could be considered by the jury only in support of the Carters' pre-1969 failure-to-warn claim. Rec. 45: 1157-60.

Petitioner's attempt to raise the "advertising or promotion" issue by reference to the trial court's April 4, 1996 pre-trial ruling on petitioner's motion for partial summary judgment is spurious. In that motion, petitioner argued in the abstract that "*Cipollone* Requires Dismissal of Plaintiffs' Post 1969 'Failure-to-Warn Claims'," but did not ask for the exclusion of any particular type of evidence. *See* Defendants' Mem. Of Law in Support of Their Motion for Summary Judgment, at 7 (Mar. 15, 1996), Rec. 2: 362. The court granted the motion in part, agreeing with the parties that to the extent

that the Carters' failure-to-warn claim relied on the adequacy or inadequacy of post-1969 advertising or promotion of cigarettes, it was preempted by the FCLAA. Cert. App. 45a. The trial court did not purport to address whether any specific testimony or other evidence concerning hypothetical package inserts would invade the preempted domain of "advertising or promotion," because neither Dr. Feingold's testimony nor the insert was yet before the court. Thus, petitioner is flatly wrong that the trial court's partial summary judgment "decision paved the way for the Carters to introduce a proposed package insert" (17a). The trial court's ruling simply had nothing to do with package inserts or Dr. Feingold's testimony and petitioner cites nothing in the record suggesting that it did. To the contrary, when Dr. Feingold's testimony and hypothetical package insert were later presented at trial, the parties did not dispute that this evidence related to "advertising or promotion," and that therefore it was relevant only to the pre-1969 period. Rec. 45: 1157-60.[1]

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[1] Petitioner seeks to transform its "advertising or promotion" argument into a separate basis for review by claiming that review should be granted because the Florida Supreme Court's affirmance of the trial court's ruling on the motion for partial summary judgment permitted the jury to decide an issue of federal law, *i.e.* the preemptive effect of the FCLAA on the hypothetical package insert. Pet. 25. However, the trial court's alternative ruling — that, under *Cipollone*, there may be forms of communication that escape preemption because they are not "advertising or promotion" (Cert. App. 45a) — never became relevant at trial, because the Carters did not contend that the hypothetical package insert was not "advertising or promotion." Thus, as explained in the text, the jury did not decide anything regarding preemption, and

(continued...)

* * *

In sum, there is simply no factual basis for the fundamental claim upon which the petition is based — that Dr. Feingold's testimony was used to impose post-1969 failure-to-warn liability. Review should be denied on that ground alone.

B. Even Assuming A Factual Basis For The Petition, The Petition Should Be Denied Because The Florida Supreme Court Applied Settled Legal Principles In Harmony With The Rulings Of Other Courts.

Even assuming that the petition has some factual basis, and that, in fact, the jury could have believed that Dr. Feingold's testimony was a basis for imposing post-1969 liability, the petition should be denied. The petition does not dispute that the Florida Supreme Court understood, and properly stated, the applicable legal principles. Cert. App. 15a-16a (discussing *Cipollone*). Thus, even if the factual premises for the petition are accurate, the only question would be whether, on the unique facts of this particular case, admission of Dr. Feingold's testimony violated established preemption principles. Review of the decision below would thus involve asking whether the Florida Supreme Court misapplied *Cipollone* when it allowed the jury to consider post-1969 evidence, *i.e.*, a classic situation where review is inappropriate.

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[1](...continued)
certainly was not instructed to decide whether the hypothetical insert was "advertising or promotion," because that was not an issue in the case. Instead, as explained above, the jury was properly instructed under *Cipollone* and asked only to apply the facts to the relevant legal principles.

See S. Ct. Rule 10 (review "rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law").

Petitioner seeks to evade that basic problem by asserting that the decision below "directly conflicts" with *Cipollone* and federal and state case law. Pet. 16. That assertion is incorrect. Petitioner's canvass of the post-*Cipollone* case law at pages 17 to 19 of the petition serves only to underscore the highly idiosyncratic nature of the alleged issue here: the admissibility of an expert's testimony concerning a hypothetical package insert. Petitioner does not cite a single case concerning that question or one remotely like it, which reflects the fact that a ruling by this Court on the merits would resolve nothing beyond this particular case.

The cases cited in the petition demonstrate post-*Cipollone* unity among the courts, rather than conflict. As the parenthetical accompanying each citation indicates, the cases upon which petitioner relies stand for the unremarkable proposition that post-1969 failure-to-warn claims dealing with "advertising or promotion" are preempted by federal law. *See, e.g.*, Pet. 17 (quoting Fifth Circuit case stating that claims "based on fraudulent concealment or a failure to warn after 1969 ... are preempted by the" FCLAA), Pet. 18 (citing Texas Supreme Court case to the effect that post-1969 claims regarding cigarette advertising or promotional materials are preempted). These general statements of applicable preemption law, taken directly from *Cipollone*, are precisely the same formulation stated by the Florida Supreme Court below (Cert. App. 15a-16a) and included in the jury instruction.

The only cases that petitioner describes in any detail are federal district court decisions from Florida, Alabama, and New Jersey. Because those cases are not binding precedents even in

their own courts, let alone in the circuit courts, they do not provide a basis for review. *See* S. Ct. Rule 10. In any event, those cases are not at odds with the decision below. As the petition indicates (at 19), in *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996), the court construed "advertising or promotion" to include public service messages and seminars. Although rather broad, that ruling has nothing to do with this case, in which the jury was never asked to consider anything other than the efficacy of a package insert, which no one contended fell outside the FCLAA's definition of "advertising or promotion." Although it may be true that "[u]nder *Sonnenreich*," the hypothetical package insert prepared by Dr. Feingold "could not form the basis for a post-1969 failure to warn claim," Pet. 19-20, that conclusion flows not from the definition of "advertising or promotion" but from *Cipollone*'s basic pre-1969/post-1969 dichotomy, which was properly stated (and applied) by the court below. As explained in Part A above, the Carters never sought to impose liability on the ground that petitioner had a post-1969 duty to warn.

Lacey v. Lorillard Tobacco Co., 956 F. Supp. 956 (N.D. Ala. 1997), which involved only post-1969 claims, *id.* at 961 n.1, is to the same effect. According to petitioner, *Lacey* stands for the undisputed proposition that "a plaintiff's claim based upon an alleged duty of defendants to provide to consumers more information regarding smoking and health than is required by the [FCLAA] is preempted." Pet. 20 (quoting *Lacey*, 956 F. Supp. at 964). Although petitioner asserts that *Lacey* is important because it broadly defines "advertising or promotion," that point, as noted above, is irrelevant, because the Carters' failure-to-warn claim does not call for a contrary

interpretation of "advertising or promotion."[2]

Following this Court's decision in *Cipollone*, the lower courts agree that failure-to-warn claims concerning cigarette advertising or promotion escape preemption if they are premised on conduct prior to 1969, but are preempted if they are premised on conduct after 1969. No post-*Cipollone* court has misunderstood that basic point, as the petition itself makes abundantly clear. The jury was properly instructed on that issue, and the Florida Supreme Court's opinion accurately states it as well.

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[2]For the same reason, *Griesenbeck v. American Tobacco Co.*, 897 F. Supp. 815 (D.N.J. 1995), upon which *Lacey* relied, is also irrelevant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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